**February 19, 2009**

**DECISION AND ORDER**
**OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioners: Patrick Daniel O'Neill, Jr.
Mark Steven Ludwig

Date of Filing: January 21, 2009

Case Numbers: TFA-0291
TFA-0292

On January 21, 2009, Mark Steven Ludwig and Patrick Daniel O'Neill, Jr. (Appellants) filed appeals from determinations issued to them by the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (NNSA/SC). In the two determinations, NNSA/SC responded to a request for documents that each Appellant had submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. At issue in this case is NNSA/SC's withholding from each Appellant of a report, and most of its appendices, authored by Norman Bay and John Kern (Bay Report). This appeal, if granted, would require NNSA to release the Bay Report and its appendices to the Appellants.[1]

## I. Background

The Bay Report was created pursuant to a request of Sandia Corporation (Sandia). Sandia received allegations from two Sandia Ethics Office investigators who claimed their work was being impeded and that they were being retaliated against by Sandia managers as a result of their investigation. Because such allegations would have been investigated by the complaining Ethics Office investigators themselves, Sandia retained Norman Bay (Bay), a professor of law at the University of New Mexico, to conduct an investigation.

In requests dated February 19, 2008, the Appellants each sought from NNSA/SC various documents including the Bay Report and all associated appendices. On August 29, 2008, NNSA/SC sent each of the Appellants a determination letter regarding his request in which the Appellant was supplied a number of requested documents. However, NNSA/SC withheld the Bay Report pursuant to Exemption 5 of the FOIA. Specifically, NNSA/SC asserted that the Bay Report was protected by the attorney work product and attorney-client privileges and thus was appropriately withheld pursuant to Exemption 5. Exemption 5 exempts documents which would not be available by law to a party other than an agency in litigation with the agency.

[1] We will reference the Bay Report and the withheld appendices henceforth as the "Bay Report."

The Appellants filed appeals of NNSA/SC's determinations with the Office of Hearings and Appeals (OHA) on September 24 and September 29, 2008. We granted the appeals, finding that NNSA/SC lacked standing to assert the two privileges cited in its determination letter to the Appellants. We found that because Sandia, and not NNSA/SC, engaged Bay as its attorney to prepare the report, the only relevant attorney-client or attorney work product privilege as to the Bay Report would belong to Sandia or Bay and not to NNSA/SC. We therefore remanded the matter to NNSA/SC to release the Bay Report to the Appellants or issue another determination to the Appellants justifying withholding the Bay Report. *Mark Steven Ludwig*, Case No. TFA-0276 (2008).[2]

On December 17, 2008, NNSA/SC issued a new determination to each Appellant, this time withholding the Bay Report pursuant to FOIA Exemption 4, as well as finding that certain information in the report was protected by Exemption 6. Letter from Carolyn Becknell, Freedom of Information Officer, Office of Public Affairs, NNSA/SC, and Tracy Loughead, Manager, Office of Public Affairs to Mark Stephen Ludwig (December 17, 2008); Letter from Carolyn Becknell, Freedom of Information Officer, Office of Public Affairs, NNSA/SC, and Tracy Loughead, Manager, Office of Public Affairs to Patrick Daniel O'Neill, Jr. (December 17, 2008).[3] Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In its new determination, NNSA/SC stated that the Bay Report is confidential and also "is privileged in that it is protected by the attorney-client privilege and the attorney work product privilege." Determination Letter at 1.

In the present appeal, the Appellants contend that the Bay Report is not exempt from disclosure under the FOIA. Regarding the application of Exemption 4, the Appellants do not claim that the Bay Report does not fall within the scope of either the attorney-client or attorney work product privileges. Rather, they contend that Sandia waived these privileges by taking the following alleged actions: (1) making a "redacted summary" of the report, a copy of which was provided with the appeal, available on its internal web page and releasing it to the media; (2) providing a complete copy of report to the Appellants for their review in June and July 2003; (3) providing a copy of the report in its entirety to one of its employees, Patricia Gingrich, prior to her initiating litigation against Sandia; (4) providing entire copies of the report to other individuals both internal and external to Sandia without accounting for how it was to be shared or copied; (5) providing a copy of the report to the office of Senator Charles Grassley; (6) leaving a company-owned laptop containing the report on a commercial aircraft and forgetting to retrieve it. Letter from Mark Stephen Ludwig to Director, Office of Hearings and Appeals (January 16, 2009); Letter from Patrick Daniel O'Neill, Jr. to Director, Office of Hearings and Appeals (January 16, 2009).

After receiving the present appeal, we provided a copy to NNSA/SC and asked for Sandia's response to the above allegations. Electronic mail from Steven Goering, OHA, to Carolyn

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[2] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996 are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[3] Because these two determinations letters are substantially identical, save for the names and addresses of the Appellants, we hereinafter cite them as "Determination Letter."

Becknell, Freedom of Information Officer, NNSA/SC (January 22, 2009); Electronic mail from Steven Goering, OHA, to Pamela Arias-Ortega, NNSA/SC Office of Chief Counsel (January 29, 2009).

With regard to the Appellants' first allegation, Sandia states that it has never asserted a claim of attorney work product privilege as to the redacted summary of the Bay Report, which it describes as "a releasable copy for use by Sandia Management in both responding to external requests and in informing the Sandia workforce concerning the outcome of the investigation." Attachment to electronic mail from Pamela Arias-Ortega to Steven Goering (February 2, 2009) ("Sandia Response") at 1.[4]

Sandia admits that the Appellants were given access to read the report in July 2003, but that neither was "provided a copy of the Bay Report or any part of it or of the unredacted summary of the Bay Report." *Id.* Further, Sandia disputes the allegation that it provided Ms. Gingrich with a copy of the entire report, stating that it provided only that portion of the report addressing a specific matter that was being reviewed by a Sandia Disciplinary Review Committee in considering possible disciplinary action against Ms. Gingrich. *Id.* "Consistent with Sandia policy and practice, Ms. Gingrich was earlier provided that portion of the Bay Report to enable her to provide a written response and position statement regarding those concerns . . . ." *Id.* During subsequent litigation against Sandia, Ms. Gingrich was provided the report in its entirety, "but only after a Confidentiality Order, to which the Report was subject, was entered by the Court." *Id.*

Sandia also denies that it released the report to other individuals

> without accounting for the release or how it was shared or copied. Sandia kept record of the releases, which were made to a limited number of people both internally who had a business need to know and externally to an even more limited number of people who had both a relationship with Sandia and who either had a right to such copy and/or a business need to know (e.g., various DOE officials/employees, Lockheed Martin Corporation). The copies were properly marked as Privileged and as Unclassified Controlled Information and, when that designation was considered not to be meaningful to or binding upon the recipient, the Report was released only when assurance was given by the recipient that the Report would be kept confidential.

*Id.* As an example of its treatment of the Bay Report, Sandia cites its release of the report to Senator Grassley, and references documents provided to our office in our consideration of the previous appeal regarding the report. Included in those documents were copies of communications among the Senator, DOE, and Sandia, one of which is a letter from Senator Grassley to the Secretary of Energy stating that the Senator "would agree to maintain the

[4] Sandia states that the language found in the redacted summary of the Bay Report is the same as that "found at pages 1 through 4 and 34 through 59 of the Report." Electronic mail from Pamela Arias-Ortega to Steven Goering (February 10, 2009). NNSA/SC has since informed us that Sandia will provide those pages to NNSA/SC for release to the Appellants. Electronic mail from Pamela Arias-Ortega to Steven Goering (February 12, 2009).

confidentiality of the Bay Report." Letter from Senator Charles E. Grassley to Spencer Abraham, Secretary of Energy (June 17, 2003).

Finally, Sandia disputes "that the Bay Report [was] on the laptop lost by a Sandia Vice President." Sandia Response at 1. Sandia states that the company official in question headed a "Special Management Team" that was "specifically charged with addressing concerns that were *not* addressed in the Bay Report." *Id.* at 2. The team was provided hard copies of the report, "so that they could understand what the issues were that the Appellants had raised; identify and consider what was not addressed by the Bay Report; . . ." *Id.* Sandia also notes that the report "was not provided to anyone outside the Legal Division in electronic form, . . ." *Id.* at 1.

Beyond assertions, the Appellants offer no basis for their allegations that Sandia did not account for the release and further distribution of the report, or for the allegation regarding the lost laptop, and we find none. We are left then with the issue of whether the disclosures of the report which are not in dispute waived protection of the report under the attorney work product privilege.[5] We conclude, for the reasons set forth below, that Sandia actions did not waive the privilege.

## II. Analysis

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategy "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

### A. Sandia Did Not Waive the Privilege By Release of the Bay Report to Senator Grassley or By Its Public Release of a Redacted Summary of the Report

This office has never ruled on the issue of waiver of the attorney work product privilege under the FOIA.[6] However, the U.S. Court of Appeals for the D.C. Circuit considered the waiver

[5] We make no finding here as to whether Sandia waived protection of the report under the attorney-client privilege. Though NNSA/SC also cited that privilege and other bases for the withholding of the Bay Report, each of which the Appellants challenge, we need not address them here. Even if we were to find that the report could not be withheld for other reasons, we would reach the same conclusion that no waiver of the attorney work product privilege by Sandia precluded NNSA/SC from withholding the Bay Report under Exemption 4.

[6] The Appellants cite the decision of the New Mexico Court of Appeals in *Gingrich v. Sandia Corp.*, 142 N.M. 359 (2007), in which the court found that Sandia had waived the attorney-client and attorney work product privileges with respect to the Bay Report. We note that the cited decision contains no discussion of the reasons for its finding of waiver as to the attorney work product privilege, but does cite standards for waivers of privileges generally set forth in the *New Mexico Rules Annotated.* Unlike the New Mexico state courts, our decisions in FOIA cases are not governed by particular state laws, but rather by federal statutory and common law, in this instance the federal common law as to the attorney work product privilege. Thus, the decision cited by the Appellants is not authority that is binding on this office nor helpful to our determination in the present case.

issue in the context of application of the privilege under FOIA Exemption 5. *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598 (D.C. Cir. 2001). At issue in *Rockwell* was a Justice Department report of investigation of its prosecution of Rockwell International Corporation, the DOE contractor that had been responsible for the operation of the Rocky Flats Nuclear Weapons Plant. Rockwell sought copies of attachments to the report that the Justice Department had not made public, and the Department withheld them under the Exemption 5 attorney work product privilege.

In *Rockwell*, the Appellant argued that the Justice Department waived the work product privilege by taking "'many actions inconsistent with maintaining the confidentiality of its work-product,' such as 'provid[ing] its work-product to Congress . . . , and publish[ing] portions of its work-product in its Report.'" *Rockwell*, 235 F.3d at 605. Regarding the release of some of the attachments to Congress, the court relied on a previous case where it found that the Army's release of an internal legal memorandum to Congress did not waive the protection of Exemption 5. *Id.* at 232 (citing *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir.1979)). As it did in *Murphy*, the court cited section 552(d) of the FOIA, which states that the Act "is not authority to withhold information from Congress." *Id.*

> If "disclosure of information to Congress [were] disclosure to the whole world," we observed, it would be "inconsistent with the obvious purpose of the Congress [in 552(d)] to carve out for itself a special right of access to privileged information," and would "effectively transform section [552(d)] into a congressional declassification scheme, a result supported neither by the legislative history of the Act, nor by general legal principles or common sense."

*Id.* (quoting *Murphy*, 613 F.2d at 1155-56). Further, because such an interpretation would render every disclosure to Congress "'a waiver of all privileges and exemptions, executive agencies would inevitably become more cautious in furnishing sensitive information to the legislative branch—a development at odds with public policy which encourages broad congressional access to governmental information.'" *Id.* (quoting *Murphy*, 613 F.2d at 1156). The court in *Rockwell* found that the facts before it were even more compelling than in *Murphy*, because "the Justice Department gave the documents to the Subcommittee only after the Subcommittee expressly agreed not to make them public." *Id.*

As for the fact that the Justice Department published portions of its work product in its report, the court stated that disclosure of work product privileged materials to a third party can waive the privilege if "such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." *Id.* (quoting *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). The court did not find the Justice Department's publishing of portions of its work product "inconsistent with a desire to keep the rest secret, particularly in view of the steps the Department took to maintain their confidentiality, . . ." *Id.* at 233.

Though the court in *Rockwell* considered waiver of the attorney work product privilege under Exemption 5, we find its holdings to be particularly applicable to the same issue in the present case under Exemption 4. First, the court relied on a standard for waiver of the privilege that it

had set forth in a prior case outside of the FOIA context, from which we can safely conclude that the court would apply the same standard under FOIA Exemption 4.[7]

Second, the *Rockwell* court's holding addresses facts analogous to those cited by the Appellants in this case, including the disclosure of the Bay Report to a member of Congress and the public release of the report's redacted summary. Following the reasoning of the court in *Rockwell*, we find that Sandia's release of the Bay Report to Senator Grassley, premised as it was on a promise of confidentiality, did not waive protection of the report under the attorney work product privilege, nor do we find that such a waiver was effected by the release of a redacted summary of the report.

**B. Sandia Did Not Waive the Privilege By Allowing the Appellants and Patricia Gingrich Access to Review Part or All of the Bay Report**

A more difficult issue is raised by the fact that Sandia allowed Patricia Gingrich and the Appellants access to review part or all of the report. In *Rockwell* and *Indian Law*,[8] respectively, the courts found that waiver could be triggered by disclosure of privileged information that "is inconsistent with the maintenance of secrecy from the disclosing party's adversary," *Rockwell*, 235 F.2d. at 233 (citation omitted), or "substantially increase[s] the opportunities for potential adversaries to obtain the information." *Indian Law*, 477 F. Supp. at 148. Arguably, Gingrich was a potential adversary of Sandia before she sued the company and became a real adversary. Less clear is whether the Appellants could be viewed as potential adversaries, particularly at the time they were given access to the report in 2003.

In any event, even assuming, *arguendo*, that all three were adversaries of Sandia at time they were allowed to read the report, we would not find that Sandia waived the attorney work product privilege by granting them such access. As did the court in *Rockwell*, we find support for our conclusion in previous decisions of the D.C. Circuit on the issue of waiver of the attorney work product privilege, outside the context of the FOIA.

For example, the *Rockwell* court cited its previous decision in *In re Sealed Case*, quoting its statement that the "purposes of the work product privilege are . . . not inconsistent with selective disclosure—even in some circumstances to an adversary." *Rockwell*, 235 F.2d. at 233 (quoting *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982). Framing the issue as one of whether an "'objective consideration' of fairness negates Company's assertion of privilege," the court in *Sealed Case* found selective disclosure inconsistent with the purposes of the privilege "when a party seeks greater advantage from its control over work product than the law must provide to maintain a healthy adversary system . . . ." *Sealed Case*, 676 F.2d at 817, 818 (citation omitted).

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[7] Indeed, a very similar standard was applied under Exemption 4 by the U.S. District Court for the District of Columbia. *Indian Law Res. Ctr. v. Dep't of the Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979). In *Indian Law*, the court found that the Hopi Tribe did not waive the attorney work product privilege by disclosing to the Department of Interior, acting as a "confidential agent" of the Tribe, documents prepared for the Tribe by its private counsel. *Indian Law*, 477 F. Supp. at 148. "Such limited disclosure does not . . . constitute a waiver of the work product privilege, as it will not substantially increase the opportunities for potential adversaries to obtain the information." *Id.*

[8] *See supra* note 9.

Thus, the court found the privilege was waived when a company had voluntarily provided a report of internal investigation to the SEC, and thereby could not invoke the privilege in resisting a subsequent grand jury subpoena for documents on the same subject matter. Based on a "substantial likelihood" that the company had "attempted to manipulate its privilege, by withholding vital documents while making a great pretense of full disclosure of their contents," the court concluded that the company did not "deserve the protections enjoyed by those who use the adversary system for its legitimate ends." *Id.* at 825.

Two years after *Sealed Case,* the court elaborated on the circumstances under which disclosure to an adversary would be inconsistent with the purposes of the privilege. *In re Subpoenas Duces Tecum,* 738 F.2d 1367 (D.C. Cir. 1984). At issue again were documents a company had previously disclosed to the SEC, but for which the company later claimed work product privilege protection from discovery in subsequent private litigation. The court noted that, in return for its voluntary disclosure to the SEC, the company "received the quid pro quo of lenient punishment for any wrongdoings exposed in the process. That decision was obviously motivated by self-interest. Appellants now want work product protection for those same disclosures against different adversaries . . . ." *Id.* at 1372. The court found that it would be "inconsistent and unfair to allow appellants to select according to their own self-interest to which adversaries they will allow access to the materials." *Id.* The court also considered it important that the "appellants had no reasonable basis for believing that the disclosed materials would be kept confidential by the SEC; . . ." *Id.*

Applying the same factors of "fairness" to the present case, we cannot find that Sandia waived the attorney work product privilege in the Bay Report by its past disclosures to Ms. Gingrich and the Appellants. This is not a case where, as in *Sealed Case,* Sandia is attempting to manipulate the privilege, nor is it one in which, as in *Subpoenas,* Sandia received a *quid pro quo* benefit by allowing certain of its employees to read part or all of the Bay Report, whether or not the employees were potential adversaries at the time. Further, we have no basis for finding that Sandia seeks, for tactical reasons, to withhold work product now, from a particular adversary, that it had disclosed to a different adversary in the past. Finally, based on its careful handling and limited dissemination of the full report, Sandia had a reasonable basis for believing that the contents of the report would be kept confidential by the limited number of people to whom it has been disclosed.

For all of the reasons set forth above, we find that Sandia has not waived the attorney work product privilege as to the Bay Report, and that therefore NNSA/SC was not precluded from relying on this privilege in withholding the report under FOIA Exemption 4. Accordingly, the present appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeals filed by Mark Steven Ludwig, Case No. TFA-0291, and Patrick Daniel O'Neill, Jr., Case No. TFA-0292, are denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 19, 2009